



IN REPLY REFER TO:

United States Department of the Interior

ALASKA NATIVE CLAIMS APPEAL BOARD
P.O. BOX 2433
ANCHORAGE, ALASKA 99510

IN RE: Appeal of Doyon, Limited)	DECISION
from Decision of Bureau of)	
Land Management F-19155-26)	AND
ANCAB RLS 76-2)	ORDER OF REMAND
)	

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-26 (Dec. 5, 1975).

Decision of the Bureau of Land Management reversed and remanded, December 14, 1979.

1. Alaska Native Claims Settlement Act: Conveyances: Generally--Alaska: Navigable Waters: Use of Waterway

Where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

2. Alaska Native Claims Settlement Act: Conveyances: Generally--Alaska: Navigable Waters: Use of Waterway

Historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

3. Alaska Native Claims Settlement Act: Conveyances: Generally--Alaska: Navigable Waters: Use of Waterway

Where pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel on a river and its tributaries, the use of these watercraft may be appropriately considered in determining whether rivers in the area were used or are susceptible of being used as highways of commerce.

4. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Use of Water-
way

While recreational use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title, present use for recreation purposes may be properly considered, as a corroborating factor, in determining susceptibility for use as a highway of commerce.

5. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Impediments
to Navigation

Physical impediments to navigation, such as gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

6. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Use of Water-
way

To be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

7. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Use of Water-
way

When the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

8. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Use of Water-
way--Alaska: Navigable Waters: Impediments to
Navigation

The presence of physical impediments on a water body will not result in a finding of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

9. Alaska Native Claims Settlement Act: Conveyances:
Generally--Alaska: Navigable Waters: Use of Water-
way

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times.

APPEARANCES: William H. Timme, Esq., and Elizabeth S. Taylor, Esq., on behalf of Doyon, Limited; John W. Burke, Esq., Joyce E. Bamberger, Esq., John M. Allen, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Frederick H. Boness, Esq., James N. Reeves, Esq., and Shelley J. Higgins, Esq., Office of the Attorney General, on behalf of the State of Alaska.

SUMMARY OF APPEAL

The issue involved in this decision is whether the Kandik and Nation Rivers are navigable, within the selection area in question. If navigable, title to the beds of these rivers would have passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, 43 U.S.C. § 1301-1303, 1311-1315 (1976), and would thus not be available for selection by or conveyance to the Appellant, Doyon, Limited. Following a hearing and final briefing on the evidence in this appeal, Chief Administrative Law Judge L. K. Luoma issued a Recommended Decision concluding both the Kandik and Nation Rivers were, at the time of statehood, navigable all the way from the Yukon River to the Canadian border, including the portions of the rivers within Doyon's selection area. The Board here affirms that decision. At issue, among other questions, is whether historic use of a river by trappers can be considered as evidence use or susceptibility for use as a highway of commerce; whether historic use of a river by watercraft other than steamboats, such as poling boats, tunnel boats, and river boats can be considered in determining whether a river was used or is susceptible to use as a highway of commerce. The Board rules in the affirmative on both these issues. Also an issue in this appeal, but not a part of the Board's decision at this time, inasmuch as it was previously remanded to BLM, was reservation of certain easements on other lands selected by the appellant.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On January 5, 1976, the Appellant, Doyon, Limited, filed a Notice of Appeal from Decision F-19155-26 of the Bureau of Land Management (BLM) alleging that BLM erred in its determination that there were no navigable waters within the land areas selected by the appellant pursuant to ANCSA, supra, and, also, in the reservation of certain easements on these selected lands. (The easement issue was remanded to BLM August 23, 1979.)

Basically, the appellant asserted that it filed a lands selection application pursuant to § 12(c)(3) of ANCSA, supra, for the surface and subsurface estates of three townships located within the "Kandik Basin" area, excluding the Kandik and Nation Rivers inasmuch as these water bodies were identified by the State of Alaska as being issued to the State upon statehood pursuant to the Submerged Lands Act, supra. In the decision on appeal, however, BLM determined that these two rivers were not navigable waters and were therefore not titled in the State. The acreage contained in the beds of these rivers which lay within the selection areas were thus charged against the appellant's entitlement.

By order dated May 10, 1976, the State of Alaska was made a necessary party to this appeal and in doing so the Board commented:

Regarding the State's challenge to the Board's jurisdiction, the Board refers to the following regulations by which it is bound. Regulations in 43 C.F.R. 2650.5-1(b) (1975) require the Secretary to determine the navigability of bodies of water in order to determine whether the beds of such water bodies must be included in lands conveyed to selecting Native corporations. Regulations in 43 C.F.R. 4.901(1975) confer upon the Board jurisdiction over appeals relating to land selections. A decision to convey the bed of a water body to a Native corporation pursuant to a determination of non-navigability under the above-cited regulation is sufficiently adverse to the State's claim of title to the same lands to require the State's designation as a necessary party in this appeal.

On July 26, 1976, the Board amplified its earlier ruling stating:

As defined in Section 3(e) of ANCSA, "'Public Lands" means all Federal lands and interests therein located in Alaska except: (not pertinent)' and further by regulations in 43 C.F.R. §2650.0-5(g) adopted pursuant thereto as '(including the beds of all non-navigable bodies of water), except: (not pertinent).' Therefore, the issue of navigability must be determined to enable a finding to be made whether lands selected are within available 'public lands' and further, to determine the effect on total acreage entitlement as provided in 43 C.F.R. §2650.5-1(b).

The Board therefore, concludes that it is not only authorized, but necessarily must decide issues of navigability of bodies of water located within lands selected by Native Regional Corporations.

At the conclusion of briefing on October 21, 1977, the Board issued the following order:

1. Pursuant to regulations in 43 C.F.R. §4.911(c) this Board finds that a hearing before an Administrative Law Judge is necessary on the issue of the navigability or nonnavigability of the two rivers which are the subject of this appeal. The Board, therefore, refers said issue to the Hearings Division of the Office of Hearings and Appeals with the request that a full hearing be held for the factual determination of the issue of navigability and that a recommended decision be rendered as a result thereof. Upon receipt of the transcript and the recommended decision, this Board will then make a final determination of the matter.

2. The test of navigability of the two rivers in issue on this appeal shall be, as proposed in briefs of the parties, the test stated in Holt State Bank, supra.

3. The burden shall be on the Appellant to establish the navigability of the two rivers in issue on this appeal.

On April 18, 1979, following a conference attended by all parties, the issue of navigability was directed to an Administrative Law Judge for hearing and a recommended decision.

Commencing on September 26, 1978, in Fairbanks, Alaska, a hearing was held before Chief Administrative Law Judge L. K. Luoma with all parties represented by counsel. Following completion of the record, post-hearing briefs were submitted. On June 1, 1979, Judge Luoma's Recommended Decision was issued. Each party to the appeal was granted time from the receipt of the decision to file exceptions with the Board; however, only the Regional Solicitor's Office, on behalf of BLM, filed exceptions raising as objections the following:

1. The recommended decision fails to recognize that navigability for title purposes is determined by a two-part test.
2. The recommended decision fails to adequately explain and apply the "proximity test."
3. The facts recited in the opinion support the BLM's contention that the recommended decision applied the law erroneously.

The appellant on September 5, 1979, filed its concurrence with the findings and conclusions of the Recommended Decision as well as a response to BLM's exceptions.

BASIS FOR DECISION

The record compiled in this proceeding and now before the Board consists of the BLM case file, the Board's file containing the Notice of Appeal, pleadings, briefs, exhibits, motions and preliminary rulings by the Board; exhibits submitted by the parties and admitted into evidence at the hearings; the hearing transcript; post-trial briefing submitted by the parties; and a Recommended Decision submitted by the Administrative Law Judge to the Board, and exceptions and concurrences thereto by the parties. It is on this record taken as a whole that the Board reaches its decision.

ISSUES

The general issue is whether the Kandik and Nation Rivers are navigable. If the rivers are navigable only in part, the issue becomes whether the rivers are navigable within the selection area. Specifically, if the rivers were navigable within the selection site at the time of statehood, title to the riverbeds thereunder passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, supra, as adopted by § 6(m) of the Alaska Statehood Act, 72 Stat. 339, as amended, 58 U.S.C. prec. § 21 note (1976),

and would thus not be available for selection by or conveyance to the appellant and should not be charged against the appellant's entitlement.

DECISION

The appellant maintains that the Nation and Kandik Rivers are navigable and unavailable for selection and thus should not be charged against the appellant's acreage entitlement. The State of Alaska concurs with the appellant. The Regional Solicitor's Office, on behalf of BLM, defends BLM's finding of the nonnavigability of the two rivers in issue.

The Administrative Law Judge's Recommended Decision, which is attached as an appendix to this decision, holds that the rivers were navigable and in so deciding makes the following legal conclusion:

I find that the navigability for title test must be used in determining the nature of the Kandik and Nation Rivers. The issue is ownership of the beds of the Kandik and Nation Rivers for the purpose of determining whether they are public lands properly charged against Doyon's total acreage entitlement under the Alaska Native Claims Settlement Act. If the rivers are navigable then title to their beds is in the State; if, however, the rivers are nonnavigable then their beds are Federally-owned and are subject to conveyance to Doyon. There does not seem to be a clearer case of navigability for title purposes. In addition, the Alaska Native Claims Appeal Board ordered that the applicable test is that expressed in United States v. Holt State Bank, supra, which was a title navigability case. Finally, Alaskan courts have applied the title navigability test in similar situations. Accordingly, application of the more restrictive navigability for title test is appropriate. [p. 14.]

There are essential elements of the navigability for title test. Navigability for title is determined by the natural and ordinary condition of a stream at the time that the State in which the stream is located entered the Union. A watercourse is probably nonnavigable for title purposes if artificial improvements are necessary to make it useful for trade and travel. The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even impossible in sections, however, does not destroy title navigability so long as the river or part of it is usable or susceptible to use

as a highway for commerce for a significant portion of the time, United States v. The Montello, 87 U.S. 430 (1874); United States v. Utah, 283 U.S. 64 (1931). The waters must be usable by the 'customary modes of trade or travel on water.' The essence of the test is that the waterway must be useful as a highway for travel and trade in the local area. Navigability is a factual question tested not by the amount or volume of commerce carried on a river, but by the extent that the commerce carried relates to the needs of the area it serves. A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. Utah v. United States, 403 U.S. 9 (1971). [pp. 14, 15.]

* * * * *

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, Proctor v. Sim, 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, Monroe v. State, 175 P.2d 759 (1946). [p. 18.]

Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation. [p. 18.]

* * * * *

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in Utah v. United States, supra, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping,

trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway. [p. 19.]

* * * * *

The fact that the rivers are frozen for 7 months of the year and that much of the current mineral exploration of the area is done by use of airplane, does not make the rivers nonnavigable. It is not necessary that navigation continue at all seasons of the year, and a stream does not become nonnavigable even if it has fallen into disuse. Kemp v. Putman, 288 P.2d 837 (1955). [pp. 19, 20.]

After review of the entire record in this matter, the Board finds that the Judge made proper findings of facts and conclusions of law, and hereby adopts and incorporates the Recommended Decision set forth in the appendix hereto. Consequently, it is the finding of the Board that title to the riverbeds passed to the State of Alaska upon statehood pursuant to § 6(m) of the Alaska Statehood Act, supra, which adopted the Submerged Lands Act, supra, and, therefore, the acreage of the beds of the two rivers should not be charged against the appellant's entitlement.

The Board has considered the exceptions taken to the Recommended Decision by the Regional Solicitor's Office, on behalf of BLM, and disagrees. The legal test for navigability was agreed upon by the parties and ordered by the Board on October 21, 1977. This test can be found in United States v. Holt State Bank, 270 U.S. 49, 56 (1925):

The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had - whether by steamboats, sailing vessels or flatboats - nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural

and ordinary condition affords a channel for useful commerce. * * *

In its exceptions, BLM contends that the Recommended Decision fails to analyze adequately this test for navigability. BLM focuses on the Court's statement that streams "are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition; as highways for commerce." [Emphasis added.]

It is BLM's position that this statement requires a two-step inquiry into navigability, in which two different tests are applied in a set sequence. Both tests relate to use of the water body as a highway for commerce; the first test addresses actual historical use for this purpose. If sufficient historical use is not found, then -- and only then -- may the trier of fact apply the second test, which examines the susceptibility of the water body to use as a highway of commerce.

BLM relies for this proposition on a statement of the Supreme Court in United States v. Utah, 283 U.S. 64, 82 (1930):

The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. (Emphasis supplied.)

Exceptions of the Bureau of Land Management, 2.

The "actual use" test, according to BLM, is historical, while the "susceptibility" test focuses on the physical characteristics of the water body and the likelihood of its future use. Following this approach, BLM contends that the evidence does not show sufficient historic use to support a finding of navigability, and that, invoking the second test, physical characteristics of the rivers likewise do not justify a finding of susceptibility to use.

BLM asserts that Judge Luoma erred in that, finding insufficient evidence to support a finding of navigability under either one of the two tests, he in essence combined the two tests, and used evidence relevant to one test to buttress a finding of navigability under the other.

The Board does not agree with BLM's analysis.

The Court in United States v. Utah, supra, was not attempting to lay down such a precise, formalistic test for navigability as BLM proposes. The Court in fact simply adopts the tests of navigability set forth in United States v. Holt State Bank, supra, and in earlier cases including The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

Referring to its own Master's report on the water bodies in question, the Court in United States v. Utah, supra, remarks without comment:

The Master finds that on the Grand river, in the 79 miles between Castle Creek and the junction with the Green river, there is a stretch of about three miles * * * in which there are three small rapids, and that, in this stretch, the river is less susceptible of practical navigation for commercial purposes than in the remainder of the river. But the Master finds that, even in this three mile stretch, the river is susceptible of being used for the transportation of lumber rafts, and that there has been in the past considerable use of the river for this purpose.
[Emphasis added.]

United States v. Utah, supra, 79.

Thus the Master, without adverse comment by the Court, used historical data -- the "past considerable use" -- to buttress a finding of susceptibility for use.

The Court in United States v. Utah rejected the government's contention that historical evidence of actual use, or the absence thereof, was controlling, and considered evidence of susceptibility for use as well. The opinion is permissive in tone, rather than restrictive; the Court broadens, rather than constricts, the scope of evidence which may be considered in determining navigability of a water body.

The Courts in United States v. Holt State Bank, supra, and numerous other cases have obviously contemplated inquiry into both historical use and susceptibility for use in determining navigability. However, these approaches are neither sequential nor mutually exclusive. Both define areas of consideration in which evidence can be taken in making the overall factual determination on navigability of a particular water body. As explained in United States v. Utah, supra, at 83:

The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

BLM's main disagreement with the Recommended Decision lies with the finding of historic use sufficient to show that both rivers have been used or are susceptible to use as a highway of commerce. The findings related to use are summarized as follows:

Boats capable of carrying commercial loads, i.e. such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. These are the poling, tunnel and river boats. * * *

Recommended Decision, 18.

Those working for the International Boundary Commission were paid to bring mail and supplies up the entire length of the Kandik and up the Nation to Hard Luck Creek. The Nation above Hard Luck Creek to the Canadian border was trapped by men, some of whom have made profits from furs. Until trapping became unprofitable in the 1940's, the trappers brought supplies up both rivers by boat and brought furs downriver by boat. * * *

Recommended Decision, 18.

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in Utah v. United States, supra, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping, trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of

the Federal test for navigability since the rivers have been used as a highway.

Recommended Decision, 19.

Because of the lack of trails and the rough nature in summer of the land surrounding the Kandik and Nation Rivers, travel by water has been the only feasible means of transport of goods between breakup and the time when the rivers freeze. Although the Kandik and Nation have been used only for intrastate commerce, such a use is acceptable under the navigability for title test. Navigability of a river is not tested by the amount or volume of commerce carried but the extent that the commerce carried relates to the needs of the area it serves. Both the Kandik and Nation are tributaries of the Yukon and even the upper reaches of both rivers are accessible to habitation and transportation routes. The rivers can be used to go someplace, as, for example, those employed by the International Boundary Commission used the Kandik to reach the Canadian boundary and trappers on the Nation used that river to obtain and transport furs. In effect, both rivers have been used for commercial travel. Although the rivers are remote and the evidence of travel on them is sparse, commerce carried on the rivers has been sufficient to establish navigability since the commerce which has been shown to exist relates to the needs of the region in which the rivers are located. The question as to the practicability of navigating the rivers for profit must be left to the one who undertakes the enterprise.

Recommended Decision, 20.

BLM relies primarily on United States v. Oregon, 295 U.S. 1 (1934), to support its argument that "use by a few trappers" does not constitute commercial use and therefore trapping cannot constitute historic use that would clearly establish that a water body has been used or is susceptible of use as "a highway for commerce."

The BLM does not consider the use of small boats by trappers to be 'commercial' in nature but has considered it to be 'subsistence' use in the typical Alaskan setting. This approach was based primarily upon the authority of United States v. Oregon which found comparable use by trappers to be insufficient to support a determination of navigability. Possibly because of United States v. Oregon the recommended decision does not squarely face the issue, 'Is use of

boats by a few trappers "commercial use" for purposes of navigability?' This is a fundamental legal issue in this case. It cannot be sidestepped.

Exceptions of the Bureau of Land Management, 6-7.

BLM misinterprets the holding of Oregon, supra, on this issue. In reviewing the evidence related to trapping, the Court states:

The evidence shows that, at times subsequent to 1890, a large number of animals were trapped in the tule areas, some in fall and spring, but principally in the winter months. Most of this evidence has no bearing on navigability, for with a few exceptions, the trappers appear to have waded or walked. [Emphasis added.]

295 U.S. at 20-21.

The special master found that the boating which took place in the area involved had no commercial aspects and was of such a character as to be no indication of navigability; * * *. [Emphasis added.]

295 U.S. at 21.

BLM apparently interprets the Court's discussion to represent a finding first, that use of a water body by trappers is insufficient as the basis for finding historic use for purposes of navigability; and second, that there must be evidence of "commercial use" to support a determination of navigability.

The Board disagrees with BLM's analysis. The Master in Oregon, supra, found the limited manner of use by trappers was only one of a number of factors which, considered together, resulted in the conclusion of nonnavigability. The Court's discussion of the limited nature of boating in Oregon does not support a conclusion that use of boats by trappers, under different circumstances, could not satisfy the requirement of susceptibility for commercial use. The referenced language in Oregon does represent an interpretation by the Court that use of a water body must either have some commercial aspects or "be of such a character as to indicate navigability," in other words, be of such a character as to indicate susceptibility for commercial use.

The argument related to the requirement of "commercial use," as opposed to private use was urged by the Federal Government in United States v. Utah, 283 U.S. 64, at 67, 68 (1931):

No lake or stream has been declared navigable by this Court unless it appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce. * * *

* * * * *

The words 'commerce' and 'useful commerce,' as used in cases where navigability was the issue, must be interpreted as meaning the exchange and transportation of goods and a use of travel by the general public for commercial purposes. Personal use without the commercial element does not satisfy the test. * * *

The Court rejected the argument that evidence of private use of a river is not sufficient to demonstrate capability for commercial use.

The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. * * *

United States v. Utah, supra, at 82.

[1] The Board affirms Judge Luoma's adoption of the holding in United States v. Utah, supra, (Recommended Decision, 16) and finds that where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

Likewise, the point of the discussion concerning trapping in United States v. Oregon, supra, is not that use by a few trappers cannot constitute historic use that might clearly establish that a water body is susceptible of use as a highway of commerce. The Court simply finds that when the evidence as to the use of the area is unrelated to use of the water body in question, it has no bearing on navigability.

In Oregon the evidence showed heavy trapping in the area, but for the most part, the trappers did not make use of the water body in question for trade or travel by boat - they waded or walked. Further, in the Oregon case there is indication of population in the immediate vicinity of the water body that suggests there would have been boating activity other than trapping had the lake been navigable:

Numerous witnesses who have lived in the vicinity for many years had never used a boat and had never, or rarely, seen one on the lake. * * *

United States v. Oregon, 295 U.S. 1, 21 (1935).

In the present appeal, the factual basis for the ruling by the Administrative Law Judge, is not, as BLM suggests, comparable to the factual basis for the ruling by the Court in Oregon, *supra*. It is undisputed that there are no settlements on either the Kandik or Nation Rivers and that the area was, and remains, undeveloped. Trapping was the primary, if not sole reason for trade or travel on the two rivers. The number of trappers, while small, was reasonable for what the drainage areas of the two river basins could support. (Tr. 99.) Testimony during the hearing, or submitted to the record later, linked the majority of the trappers identified as having used the rivers to the use of boats. (Sixteen of the twenty-one trappers identified as using the Kandik between approximately 1920 and 1940 used boats to freight supplies. Each of the seven trappers identified as having used the Nation used boats to freight supplies. (Tr. 52-56, 717-720, 724-725, Report of Investigations, Exhibit A-4, Richard O. Stern, Historian, Alaska Division of Forest, Land, and Water Management, and Charles M. Brown, Historian, U.S. Bureau of Land Management.) The boats used by these trappers included pole boats, tunnel boats, and outboard river boats, capable of carrying 1,000 pounds of freight and commonly used on other rivers in Alaska to freight supplies. (Recommended Decision, 12.)

[2] The Board does not contend that the use of a water body by trappers will necessarily result in a finding of historic use that would clearly establish susceptibility as a highway of commerce. However, the Board does find that historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

BLM further objects to the finding in the Recommended Decision related to mode of travel:

An important element of the Holt State Bank test of navigability requires that waters be usable as highways for commerce by the customary mode of trade and travel on water. The Supreme Court recognized in Holt that canoes and small row boats constituted important means of communication and transportation in early days throughout much of the west, and therefore, may be considered 'commercial' for purposes of determining navigability for title. United States v. Holt State Bank, supra, 270 U.S. at 56-57.

Recommended Decision, 16.

BLM argues that the Court did not base its decision on the assumption that if canoes and rowboats can be used, a water body meets the "susceptibility" test, and further that Holt mentions neither the use of canoes or rowboats.

The Board agrees with BLM's objections as to the reference ruling in the Recommended Decision that "canoes and small rowboats" may be considered commercial for purposes of determining navigability.

The Court, in Holt, supra, did not attempt to list specific types or classes of watercraft that the Court would treat as "commercial" for a determination of navigability. The Court did restate an important legal criteria, laid down in The Daniel Ball, supra, at 563, against which the factual evidence of each navigability case may be weighed:

[R]ivers * * * are navigable * * * in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
[Emphasis added.]

It is true, as BLM argues, that the Court did not find that "canoes and small rowboats" can be considered "commercial" for purposes of determining navigability for title. However, the Court in Holt Bank did find that "navigability does not depend on the particular mode in which such use is or may be had * * * but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce." (Holt Bank, supra, at 56.) The Court then proceeded to analyze the record before it, and found as evidence of useful commerce that "[e]arly visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for [travel]." [Emphasis added.] (Holt Bank, supra, at 57.)

The evidence in the present appeal, pertaining to watercraft is summarized as follows:

Transportation by water was one of the critical factors enabling the interior of Alaska to be opened to exploration and settlement (Tr. 94, 95, 806). The Yukon River provided the primary artery through Alaska (Tr. 132). * * * Soon after the purchase of Alaska by the United States, steamboat traffic on the Yukon began * * *. * * * The use of steamboats was initially restricted to the Yukon and the Porcupine River, which was the only Yukon tributary on which steamboats could be used, until special light draft steamers were designed for use on the Tanana and Koyukuk Rivers (Tr. 45).

* * * By 1955 the Yukon commercial steamboat traffic had ceased (Exhibit A-2, p. 67).

* * * * *

There has been slow economic development in the Yukon-Charley area because of the absence of overland trails, and the Kandik and Nation basins are still undeveloped (Tr. 95). * * *

Although the Yukon steamboats carried the bulk of the commercial river traffic, a variety of watercraft has been used historically on the interior waterways.

The Yukon poling boats were adapted from boats used earlier on western rivers. * * * The larger steamboats were not used on the tributaries of the Yukon because there was not enough freight generated on those streams to call for use of these larger boats. Poling boats, however, were used on tributaries of the Yukon. Poling boats were used on a regular basis to serve communities and transport freight, and tunnel boats were used extensively by the Alaska railroad and others (Tr. 135, 138, 145, 170). * * *

Motorboats came into use in Alaska after World War I. * * * Liftable motors were often attached to enable boats to travel over shallows. These boats are in use today and although the draught of the boats is constant, with the engine raised the boats can get over shallow spaces. The boats, accordingly, can be loaded more heavily (Tr. 161, 162). * * *

Recommended Decision, 11-12.

The Court in The Montello, 87 U.S. (20 Wall.) 430, 441-442 (1874), stated:

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. [Emphasis added.]

The Board, likewise, believes it would be a narrow rule to hold that in Alaska, unless a river was capable of being navigated by steamboat, it could not be treated as a highway capable of supporting commercial usage.

[3] The Board therefore finds that pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel in the tributaries of the Middle-Yukon area, and the use of these watercraft may be appropriately considered in determining whether rivers in this area were used or are susceptible of being used as highways of commerce.

The Recommended Decision notes that the use of the Kandik and Nation Rivers did not begin and end with trapping-related trade and travel.

Jet boats are in common use today and have been for the last 7 to 8 years (Tr. 758). Jet boats are flat-bottomed river boats 20-26 feet in length, approximately 4 feet wide, which are equipped with a 25 to 50 h.p. outboard motor with a jet unit (Tr. 567).

Recommended Decision, 13.

Since statehood, there has been recreational use of the Kandik River. BLM's's [sic] Navigability Investigation Report on the Kandik and Nation Rivers notes that the Kandik and Nation Rivers are becoming popular recreational rivers. * * *

Recommended Decision, 13.

There is testimony in the record of present use both by trappers and others. Melody Grauman, witness for BLM, states:

There's quite a bit of use of boats on the Kandik and Nation by trappers, canoes with engines powered from six to ten horses, hunters, sports hunters from Fairbanks and elsewhere coming up in jet boats, air boats, and they're able to go quite far up the--up the river.

Tr. 116.

Government employees studying the rivers for various land management proposals testified to seeing other parties on the rivers during their trips over the past two years. (Recommended Decision, 13.)

The Judge states:

Although standing alone it may not suffice to support a finding of title navigability, use of the rivers by those pursuing a subsistence lifestyle and use of the rivers for recreation corroborate that the rivers are navigable. Hunters and canoeists do not bring their boats to these rivers by road and then use only selected portions of the rivers. Rather, hunters and canoeists get to the upper reaches of both the Kandik and Nation Rivers by way of the Yukon River. Those using the Kandik and Nation for recreation must bring any supplies needed with them and they must carry out any game caught by boat. * * *

Recommended Decision, 19.

[4] In the present case, historical use by trappers is within the living memory of some of the witnesses, and use of the rivers continues, although the purpose is increasingly for recreation rather than trapping. The Board affirms the finding in the Recommended Decision that recreation use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title. Present use for recreation purposes may be properly considered as a corroborating factor in determining susceptibility for use as a highway of commerce. The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce.

The BLM repeatedly expresses concern that the Recommended Decision ignores its considerable evidence as to the physical characteristics of the two rivers and that this evidence proves that the degree of difficulty precludes a finding that the Kandik and Nation are susceptible to use as highways of commerce. In fact, the Recommended Decision does consider the physical impediments to travel on these rivers, but concludes

that "the evidence shows that these impediments do not prevent navigation." (Recommended Decision, 18.)

BLM contends that the Kandik and Nation Rivers are not navigable because their water levels fluctuate, they are hazardous, and only canoes, lightly loaded, can navigate them, because they are interspersed at various points by gravel bars or log jams. Finally, BLM contends that commercial boats carrying freight for hire have not travelled the rivers.

Recommended Decision, 17.

Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

The presence of gravel bars, riffles, or occasional log jams in themselves do not make the rivers nonnavigable, United States v. Utah, supra. Neither the Kandik nor the Nation has falls and rarely do obstructions block the channel completely. This is notwithstanding that there was testimony that one may have to pole or line a boat over shallow places. Even in August, a time of very low flow, several inches of water flowed over the gravel bars.

Boats capable of carrying commercial loads, i.e. such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. * * *

Recommended Decision, 18.

BLM argues that the Judge's reliance on United States v. Utah, supra, is inappropriate because there was more evidence of historic use in that case before the Court than was established by the evidence in this case. Further, BLM argues the Court based its finding on evidence of physical characteristics rather than historic use, and an analysis of the testimony in this case shows that the Nation and Kandik have much less "capacity" for supporting commercial use than the rivers discussed in Utah, supra. (Exceptions of the Bureau of Land Management, 7-8.)

BLM is correct in stating there was more evidence of use in Utah, supra, than in the present case, but the record indicates that there was more population and economic activity

in the area of the Green, Colorado and San Juan Rivers than there were or are in the Kandik and Nation area. The Court in Utah does analyze the physical characteristics of the water body, as does the Judge in the Recommended Decision in this case. In both cases, the finding is based on actual use.

While there is testimony that in floods and periods of high water these rivers carry a considerable quantity of logs and driftwood, the evidence as to actual trips made by witnesses discloses little danger thereby incurred except in case of paddle-wheel boats. The Master's finding, which the evidence supports, is that this condition does not constitute a serious obstacle to navigation.
* * * [Emphasis added.]

283 U.S. 64 at 84.

[5] The Board affirms Judge Luoma's adoption of the holding in United States v. Utah, supra, that physical impediments to navigation, such as the presence of gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

It is true that the Kandik and Nation are difficult rivers to navigate. It may be that the degree of difficulty evidenced in the record will constitute the outside limit of navigation for useful commerce. However, what the record in this appeal does show is that the rivers were used, not by a few people, but by -- given the isolation and economics of the area -- a surprising number of people, in watercraft capable of carrying and actually carrying, commercial-size loads customary to rivers tributary to the Yukon.

The fact that both the Nation and the Kandik are tributaries of the Yukon adds an important dimension to the finding that these rivers are susceptible to being used as highways of commerce. The Judge finds:

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, Proctor v. Sim, 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, Monroe v. State, 175 P.2d 759 (1946).

Recommended Decision, 18.

Although the Recommended Decision discusses the so-called "proximity test" immediately after the finding that both the Kandik and Nation Rivers are navigable, it is apparent from reading the Decision as a whole that the access of the rivers to the Yukon is being treated in conjunction with the further finding of historic use as a highway of commerce. The Board disagrees with BLM's representation that the Recommended Decision treats the proximity test "as an alternative legal test for determining navigability which is met solely by the fact that a waterbody flows into another navigable waterbody." (Exceptions of the Bureau of Land Management, 11.)

The Recommended Decision clearly does not rely solely on the location of the Kandik and Nation as tributaries of the Yukon to find navigability, but interweaves location as one of several factors which, taken together, result in a finding of navigability.

[6] Therefore, the Board affirms the finding in the Recommended Decision that to be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

[7] In conclusion, the Board finds that when the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

[8] The Board further finds that the presence of physical impediments on a water body will not result in a finding of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

The Board adopts the undisputed finding of the Administrative Law Judge that neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. (Recommended Decision, 18.)

Finally, the Board adopts the finding of the Administrative Law Judge that both the Kandik and Nation Rivers are navigable all the way from the Yukon River to the Canadian

border, and therefore the rivers, as they flow through the selection area, are navigable. (Recommended Decision, 18.)

The Board recognizes BLM's concern that "the recommended decision sets forth a standard under which it is difficult to imagine any river in Alaska to be nonnavigable." (Exceptions of the Bureau of Land Management, 5.)

The same concern was expressed by appellees in The Montello, supra, at 437:

If the Fox River is a navigable River of the United States, it would be impossible to conceive of any body of water that is not or might not become such navigable water.

Just as the Montello decision did not result in blanket navigation determinations, neither will the Kandik and Nation decision. The facts of each case will be examined on their merits.

[9] Simply stated, the question of navigability is factual. BLM urges its concern for having a "yardstick" for future navigability determinations in Alaska. The Board is sympathetic to this concern. However, it will not undertake to do what the United States Supreme Court has not attempted, i.e., to define in precise, checklist fashion the requirements for navigability of a body of water. Though not a title case, United States v. Appalachian Electric Power Co., 311 U.S. 377, 404 (1940), expresses the position of the Court: "The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times."

Consideration of factual determinations made in other cases can no more than assist in the process. United States v. Utah, supra, at 87:

The Government invites a comparison with the conditions found to exist on the Rio Grande in New Mexico, and the Red River and the Arkansas River, above the mouth of the Grand River, in Oklahoma, which were held to be non-navigable, but the comparison does not aid the Government's contention. Each determination as to navigability must stand on its own facts. * * *

BLM concedes that Judge Luoma summarized the evidence carefully in his Recommended Decision. The Board concurs,

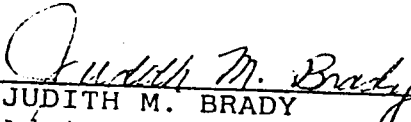
and finds in making a factual determination of the navigability of the Kandik and the Nation Rivers that the Recommended Decision applied proper principles of law and that its conclusion is supported by the evidence.


ORDER


Insofar as the Decision of the Bureau of Land Management F-19155-26 found the Nation and Kandik Rivers, within the selection area in question, to be nonnavigable, such Decision is hereby reversed and remanded to the Bureau of Land Management for action consistent with the finding that the two rivers are navigable.

This represents a unanimous decision of the Board.

DATED this 14th day of December, 1979, at Anchorage, Alaska.


JUDITH M. BRADY
Administrative Judge


ABIGAIL F. DUNNING
Administrative Judge


JOSEPH A. BALDWIN
Administrative Judge